No. 84-932

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CED'S, INC., d/b/a PRODUCTS FOR POWER,
Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

JERALD P. ESRICK
Counsel of Record for Petitioner
CED'S, INC., d/b/a
PRODUCTS FOR POWER

OF COUNSEL:

JERALD P. ESRICK
JAMES R. MORRIN
CAL R. BURNTON
WILDMAN, HARROLD, ALLEN & DIXON
One IBM Plaza—Suite 3000
Chicago, Illinois 60611
(312) 222-0400

ARNOLD M. FLANK
ARNOLD M. FLANK, LTD.
Two North LaSalle Street
Suite 2205
Chicago, Illinois 60602
(312) 236-7742

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No. 84-932

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REPLY BRIEF OF PETITIONER

The *sole* justification given by EPA in support of its search of CED's premises and records is that CED's lawfully manufactured and distributed product is misused by persons several times removed in the distribution chain. EPA has never once articulated any causal connection between CED's lawful sale and the subsequent improper use by others. EPA has only postulated that somehow a legal sale amounts to a Clean Air Act violation, without any explanation or evidence of a causal connection.[1] This lack of both explanation and evidence is

[1] The probable cause test is a comparison of an articulated offense with evidence adduced to support the claim. Without the initial threshold articulation, no true probable cause test is possible. EPA's conclusory boilerplate recitation does not permit any intelligent probable cause analysis.

supported by EPA's own statements: it has *never asserted* that CED's has ever violated any of the provisions of the Clean Air Act. Nor has EPA ever asserted that its search and seizure of CED's records was pursuant to an administrative plan based upon neutral criteria. Indeed, for the first time, EPA now states in this Court that its search was based on its perceived "need" for the records to advance its own investigation of CED's and other entities.[2] *See* Brief in Opposition, p. 6. *But see* EPA Brief in the Seventh Circuit, p. 8 n.8, Reply App. 1, p. 3b (EPA could not determine whether CED's had "caused" violations of the Clean Air Act until "after a complete investigation of all the facts and circumstances surrounding CED's operation . . ."). From the first day of this litigation, CED's has maintained that EPA's assertions are insufficient to justify both the search of its business premises and records and the seizure of whatever documents EPA deems necessary to assist in its "investigation." It is this issue which is now before the Court.

I. THE FOURTH AMENDMENT DOES NOT AUTHORIZE ADMINISTRATIVE SEARCHES WITHOUT THE ARTICULATION OF A VIOLATION OF SOME LAW.

The lawful nature of CED's product, test tubes, although much maligned by EPA, has never been in dispute. There is no question that the manufacture, marketing, and sale of test tubes are lawful activities. It is also undisputed that the use of test tubes as a testing device for catalytic convertors is permissible in 49 out of 50 states. Individual automobile owners may lawfully and permanently replace their catalytic convertors with test

[2] As EPA admits in its Brief In Opposition, this was not an issue below. EPA has always directed its allegations against CED's. For this reason alone, the facts and holding of *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), are inapposite. Moreover, *Zurcher* involved the search of a third party for necessary evidence of a criminal act in an investigation of others. Here, CED's itself is alleged to be the target of a civil investigation through its manufacture, distribution and sale of test-tubes.

tubes. CED's sells test tubes primarily to a single category of businesses: warehouse distributors. CED's also sells its product abroad and to the United States military. Under certain conditions, automotive workmen are prohibited from installing the device onto the automobiles of others. There are no assertions, however, that CED's has ever directly sold its products to such automotive workmen or for any other illegal activity.[3]

With these facts in mind, there is no justification for the warrant. EPA has never addressed, either in this Court or in the Court of Appeals, the applicable law as to when a search warrant may properly issue. For purposes of an administrative search, probable cause justifying the issuance of the warrant must be based upon either *specific evidence* of an existing statutory or administrative violation or upon a showing that reasonable legislative or administrative standards for conducting the inspection have been satisfied. *Marshall v. Barlow's,* 436 U.S. 307, 321 (1978). EPA admits it has *not* promulgated any administrative standards or regulations in this matter. The issue which this Court must address then, and which the Seventh Circuit in its utilitarian analysis failed to do, is whether petitioner's sale of a lawfully manufactured and distributed product, without more, rises to the level of evidence of an existing statutory or administrative violation. EPA has never articulated how the "sale, distribution and promotion" of test tubes could in any way result in a violation of the Clean Air Act. CED's has maintained from the start that these allegations are insufficient to justify the seizure of its premises and records.[4]

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[3] EPA has *never* asserted that CED's has directly caused a violation of the Act and has never even advanced a theory as to how any indirect causation was being accomplished.

[4] EPA dismisses in its reply brief the inspection as a "limited" intrusion. Aside from what this cavalier attitude reveals about EPA's concerns for the rights of small businesses, one can only scoff at EPA's distortion of the record. A total inspection of a facility, complete with photographs, and the search and seizure of all records pertaining to CED's business for a four-year period of time is hardly a limited intrusion.

The opinion of the Seventh Circuit, by failing to articulate the specific violation at issue, conflicts with a plethora of holdings of both this Court and others. *See, e.g., Marshall v. Barlow's*, 436 U.S. 307 (1978); *See v. City of Seattle*, 387 U.S. 541 (1967); *Weyerhaeser v. Marshall*, 592 F.2d 373 (7th Cir. 1979). It is this issue which the Court must address.

II. CED'S HAS MADE ITS FOURTH AMENDMENT ARGUMENT FROM THE VERY START.

For EPA now to claim that CED's has not previously raised the issue that EPA failed to adduce sufficient justification for its search is nothing less than disingenuous. For example, in its Brief in the Seventh Circuit (Reply App. 2, p. 5b) CED's raised the following issue for review:

> 3. Whether CED's, having been alleged by EPA to be engaged in no other activity than the mere manufacture and sale of a device that has both a legitimate and lawful use, may be considered to be "causing" a violation of Section 203 of the Clean Air Act, 42 U.S.C. § 7522(a), on the ground that other persons further removed in the distribution network may unlawfully replace catalytic convertors from automobiles and replace them with the manufactured device.

See also CED's Brief, p. 27 n. 11, Reply App. 2, p. 6b (no such facts have been alleged which would justify a finding of probable cause). In fact, prior to oral argument in the Seventh Circuit, CED's advised counsel for EPA of *additional* Fourth Amendment authority which CED's would rely upon in oral argument. Fourth Amendment issues were expressly argued before the Seventh Circuit. In the District Court, although CED's did not give its argument the appellation "probable cause," the argument was the same: EPA has neither asserted a specific violation nor advanced any evidence of a violation, both of which are necessary to justify the search of its premises. *See, e.g.*, Complaint for Injunctive Relief, p. 4, Reply App. 3, p.

7b. This fact is witnessed in EPA's own memorandum in opposition to CED's emergency motion for a temporary restraining order and preliminary injunction, wherein EPA argued that it had met the standards necessary for the issuance of a warrant. *See* Reply App. 4, p. 12b. EPA's argument to this Court that CED's has not previously raised this position simply is unfounded.

III. CONCLUSION

CED's has maintained from the first day of this litigation that EPA has failed to articulate or establish that which is necessary to justify its search and seizure of CED's records. This Court has previously held that a search is justified only where there is specific evidence of an existing specified statutory violation. Under the opinion of the Seventh Circuit, administrative agencies now have the authority to inspect an entity's records and premises in the absence of any showing that the conduct complained of even amounts to an administrative violation. This is constitutionally insufficient. This Court should grant CED's petition for a writ of certiorari to resolve the issue of what must be alleged by an administrative agency to justify a warrant in an administrative setting.

Respectfully submitted,

JERALD P. ESRICK
Counsel of Record for Petitioner
CED'S, INC., d/b/a
PRODUCTS FOR POWER

OF COUNSEL:
JERALD P. ESRICK
JAMES R. MORRIN
CAL R. BURNTON
WILDMAN, HARROLD, ALLEN & DIXON
One IBM Plaza—Suite 3000
Chicago, Illinois 60611
(312) 222-0400

ARNOLD M. FLANK
ARNOLD M. FLANK, LTD.
Two North LaSalle Street
Suite 2205
Chicago, Illinois 60602
(312) 236-7742

REPLY APPENDIX

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No. 83-2608

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

CED'S, INC., d/b/a PRODUCTS FOR POWER,

Appellee

v.

ENVIRONMENTAL PROTECTION AGENCY,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLANT

F. HENRY HABICHT, II
Acting Assistant Attorney General

DAN K. WEBB
United States Attorney
Chicago, Illinois 60604

ROBERT T. GRUENEBERG
Assistant United States Attorney
Chicago, Illinois 60604

MARTIN W. MATZEN
ARTHUR E. GOWRAN
Attorneys, Department of Justice
Washington, D.C. 20530
(202) 633-2754

OF COUNSEL:

A. JAMES BARNES

General Counsel

WILLIAM F. PEDERSEN
RALPH J. COLLELI
Attorneys, Environmental Protection Agency
Washington, D.C. 20460

C. Issuance of the warrant and the inspection. —On April 5, 1983, the magistrate issued the administrative warrant to the EPA. The warrant authorized agency representatives to inspect and copy certain specified business documents (*e.g.*, receipts, invoices, customer lists, and correspondence) relating to the promotion and sale of test tubes in order to determine whether a violation had been or was being committed (App. 82-83). The EPA had not previously required CED's to maintain such documents under Section 114(a)(1)(A) of the CAA. Such records were maintained by CED's in the ordinary course of business.

On April 6, 1983, EPA enforcement officials served the warrant, and EPA agents entered CED's facility during normal business hours and examined, inspected, and copied documents specified in the warrant. To minimize disruption of CED's operations, most of the inspected documents were copied on the firm's premises. The few documents which were

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[*Footnote continued from previous page.*]

and other regulated persons. CED's promoted its product through advertisements in muffler industry journals, through appearances at trade shows and conventions, by product packaging and claims, and, allegedly, through direct contact with at least one muffler shop. EPA indicated that such activities might have been in violation of Section 203(a) (Application for Warrant, R. 15; App. 58-61).

EPA never asserted that mere sales, without more, of catalytic converter replacement pipes would violate the "causing" prohibition of Section 203(a). *See, e.g.*, Tr. of May 27, 1983, hearing at 34, App. 118; Application for Warrant at 2-5, App. 58-61. On the contrary, EPA has maintained that only after complete investigation of all the facts and circumstances surrounding CED's operations would it be possible to determine whether CED's had in fact violated Section 203(a) (e.g., Application for Warrant, R. 15; App. 57).

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 83-2608

CED'S, INC., d/b/a
PRODUCTS FOR POWER,
Plaintiff-Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and WILLIAM RUCKLESHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendants-Appellants.

Appeal from United States District Court for the Northern District of Illinois, Eastern Division

No. 83 C 2409

Honorable
John A. Nordberg
Judge

BRIEF AND APPENDIX OF PLAINTIFF-APPELLEE CED'S, INC., d/b/a PRODUCTS FOR POWER

JAMES R. MORRIN
Cal R. Burnton
Arnold M. Flank
Attorneys for Plaintiff-Appellee

JAMES R. MORRIN
CAL R. BURNTON
WILDMAN, HARROLD, ALLEN & DIXON
One IBM Plaza, Suite 3000
Chicago, Illinois 60611
(312) 222-0400

ARNOLD M. FLANK
Arnold M. Flank, Limited
2 North LaSalle St., Suite 2205
Chicago, Illinois 60602
(312) 236-7742

Pandick Press Midwest, Inc., Chicago • 454-7600

[-2-]

3. Whether CED'S, having been alleged by EPA to be engaged in no other activity than the mere manufacture and sale of a device that has both a legitimate and lawful use, may be considered to be "causing" a violation of Section 203 of the Clean Air Act, 42 U.S.C. § 7522(a), on the ground that other persons further removed in the distribution network may unlawfully remove catalytic converters from automobiles and replace them with the manufactured device.

4. Whether the district court, after holding that EPA had no statutory authorization to inspect and copy the documents of CED'S, Inc., properly granted to CED'S injunctive relief.

STATUTES INVOLVED

Resolution of this appeal involves an interpretation of Sections 114(a) and 203(a) of the Clean Air Act, 42 U.S.C. § 7414(a) and § 7522(a). Section 114(a) of the Act, under which authority EPA seeks to maintain its search, provides:

> Record Keeping, inspections, monitoring, and entry
>
> (a) For the purpose of (i) of developing or assisting in the development of any implementation plan under section 7410 or section 7411(d) of this title, any standard of performance under section 7411 of this title, or any emission standard under section 7412 of this title, (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) *carrying out any provision of this chapter* (except a provision of subchapter II of this chapter with respect to a manufacturer of new motor vehicles or new motor vehicle engines)—

[-26-]

Act simply by manufacturing Test Tubes cannot stand. The district court correctly concluded that the "causing" language of Section 203 does not apply to CED'S.[10]

[10] This conclusion was shared by the district court in *National*

[*Footnote continued on following page*]

A. Neither the Manufacture Nor the Sale of Test Tubes is Illegal.

EPA concedes that the Clean Air Act prohibits neither the manufacture nor the sale of Test Tube(s). EPA Brief p.8 n.8. Test Tubes may be lawfully used to test the efficiency or efficacy of catalytic converters; they are needed for automobiles which are exported from the United States; and they may also be lawfully used to replace a catalytic converter by individual car owners. *See* H.R. Rep. No. 95-294, 97th Cong. 1st Sess. (1977), EPA Supp. App., p. 54. Although EPA suggests that CED'S markets its product to certain individuals who, if they should subsequently permanently install the Test Tube(s), would be in violation of the Clean Air Act, there is no evidence to refute CED'S assertion that it never acted unlawfully.[11] Furthermore, the question of to whom CED'S markets its product was not an issue in the district court. CED'S customers are wholesalers. It is beyond dispute that Section 203 does *not* prohibit car repair shops from legally installing the devices on a temporary basis for testing and repair purposes. Further, Test Tubes may be lawfully purchased and used by individual car owners and car repair shops acting in compliance with the law.

[*Footnote continued from preceding page*]

Muffler Manufacturing Co., Inc. v. EPA, No. 83-929A (N.D. Ga. Sept. 21, 1983), where the court stated that "with removal as the prohibited activity, the court believes that a more direct cause than the furnishing of a substitute not itself unlawful is required." *Id.* at 6, EPA App. III, p. 145.

[11] EPA further asserts that because catalytic converter replacement pipes are addressed in five state statutes, CED'S also "causes" a violation of the Act. Like the Act, however, those statutes are not directed at manufacturers. In any event, for probable cause to exist there must be evidence that defendant either deliberately caused a removal, *see, United States v. Kunofske*, 243 U.S. 440, 443 (1917), or conducted itself in such a way as to have the inevitable effect of causing the prohibited activity, *see Chrysler Corp. v. EPA*, 631 F.2d 865, (D.C. Cir. 1980). No such facts have been alleged here.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

CED'S, INC., d/b/a PRODUCTS FOR POWER,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LEE THOMAS, Acting Administrator, United States Environmental Protection Agency,

Defendants.

NO.

COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff, CED'S, INC., d/b/a PRODUCTS FOR POWER ("CED'S"), for its complaint against defendants, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("EPA") and LEE THOMAS, Acting Administrator, United States Environmental Protection Agency ("Thomas"), states as follows:

1. Jurisdiction is founded upon the existence of a Federal question. This action arises under the provisions of the Clean Air Act, as amended, 33 U.S.C. §§ 7401, *et seq.*

2. CED'S, Inc. is a corporation incorporated under the laws of the State of Illinois with its principal place of business at 25 Official Road, Addison, Illinois. "Products for Power" is an operating division of CED'S, Inc., engaged in the manufacture and production of internal combustion engine exhaust system equipment, including mufflers, tail pipe connecters and adapters, clamps and hangers for said systems.

3. CED'S also manufactures a product designed and sold for the purpose of testing for operational problems with exhaust system catalytic converters, which product is sold under the registered trademark of "Test Tube".

4. CED'S is not a "manufacturer" or "dealer" as said terms are defined by the Clean Air Act, 42 U.S.C. § 7550(1) and § 7550(4), respectively. Products for Power is not engaged in the business of repairing, servicing, selling, leasing or trading motor vehicles or motor vehicle engines. Neither CED'S, Inc. nor Products for Power are engaged in the operation of a fleet of motor vehicles.

5. The Products for Power division of CED'S, Inc. sells Test Tubes primarily to warehouse distributors of automobile equipment. CED'S sells no test tubes to automobile manufacturers, or new or used automobile dealers.

6. On April 5, 1983, the United States Attorney on behalf of EPA filed with this court an "Application for Administrative Warrant", purportedly pursuant to its authority under Sections 114 and 203(a) of the Clean Air Act (hereinafter the "Act"), 42 U.S.C. § 7414 and § 7522(a), respectively. Pursuant to said Application, U.S. Magistrate Sussman ordered a civil inspection warrant ("the Warrant"). True and correct copies of the Application for Administrative Warrant and the Warrant are attached hereto as Exhibits A and B, and are made parts hereof.

7. On April 6, 1983, U.S. EPA agents, pursuant to the Warrant, entered upon the aforesaid property of CED'S, Inc., d/b/a Products for Power, and commenced a search of CED'S, Inc., correspondence, records, customer lists and other documents as more fully set forth in said Warrant.

8. On April 6, 1983, CED'S filed a Motion to Quash the Warrant. A true and correct copy of CED'S Motion to Quash the Warrant is attached hereto as Exhibit C and is made a part hereof. On April 6, 1983, Magistrate Sussman denied said Motion to Quash.

9. U.S. EPA has made clear its intent to continue to execute the Warrant, and to continue to enter upon the property of CED'S and inspect CED'S, Inc., d/b/a Products for Power, records, correspondence, customer lists and other documents as set forth in the Warrant.

10. The U.S. EPA, pursuant to the Clean Air Act, has never requested or required CED'S, Inc., d/b/a Products for Power to maintain any records whatsoever with respect to Test Tubes or any other product manufactured or sold by CED'S.

11. CED'S has never knowingly removed or rendered inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under the Clean Air Act either prior to or after delivery of any such vehicle to an ultimate purchaser.

12. CED'S, Inc. has never knowingly directed or caused any person, manufacturer, dealer, or any person engaged in the repairing, servicing, selling, leasing or trading of motor vehicles or motor vehicle enginges to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under the Clean Air Act either prior to said vehicle's sale and delivery to an ultimate purchaser, or after such sale and delivery.

13. Unless restrained, EPA will continue to enter upon the property of CED'S and continue to copy and inspect CED'S records and other documents, customer lists, and other valuable information owned by CED'S all in violation of the Clean Air Act and of CED'S rights under the Fourth Amendment to the Constitution of the United States of America. Said violation constitutes irreparable harm to CED'S, an unlawful taking of a valuable property right of CED'S, and unlawful invasion of CED'S property and privacy rights.

14. CED'S has no adequate remedy at law to prevent the wrongful invasion of its privacy and property rights.

15. No hardship will result to EPA if it is enjoined from its unlawful invasion of CED'S property and privacy rights.

WHEREFORE, plaintiff prays:

1. That this Court enter a Temporary Restraining Order and a Preliminary Injunction, or either of them, and a Permanent Injunction enjoining U.S. EPA, its agents, officers, employees and contractors from executing the Warrant issued by Magistrate Sussman on April 5, 1983, and that U.S. EPA be ordered to return to CED'S all documents taken, and copies and notes thereof, as a result of its unlawful inspection conducted pursuant to said Warrant.

2. That this Court enter a Permanent Injunction enjoining U.S. EPA, its agents, officers, employees and contractors from at any time entering upon the premises of CED'S or from obtaining access to and inspection and copying of any documents or other records owned by CED'S, wherever situated.

/s/ JAMES R. MORRIN
James R. Morrin
One of CED'S Attorneys

JAMES D. FIFFER
James D. Fiffer
One of CED'S Attorneys

James R. Morrin, Esq.
James D. Fiffer, Esq.
Attorneys for Plaintiff
One IBM Plaza, Suite 3000
Chicago, Illinois 60611
(312)222-0400

OF COUNSEL:

Wildman, Harrold, Allen & Dixon
One IBM Plaza, Suite 3000
Chicago, Illinois 60611
(312)222-0400

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

CED's, Inc. d/b/a
PRODUCTS FOR POWER,
Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.
Defendants.

No. 83-C-2409

Judge Nordberg

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

On April 5, 1983 the United States Environmental Protection Agency ("EPA") applied for and obtained an administrative warrant to inspect and copy documents in the possession of CED'S, Inc., d/b/a Products for Power ("CED's"), in connection with an investigation under the Clean Air Act (the "Act"), 42 U.S.C. 7401 *et seq.* The following day CED's moved to quash the warrant but its motion was denied by Magistrate Sussman.

On April 7, 1983, CED's filed an emergency motion seeking a temporary restraining order or preliminary injunction ("emergency motion") to enjoin execution of the warrant and the return of all documents

* * *

(ii) EPA has met the legal standard for the issuance of the warrant.

The applicable case law demonstrates that the agency bears a minimal burden to obtain an administrative search warrant. *Public Service Co. of Indiana, Inc.* v. *EPA,* 509 F. Supp. 720 (S.D. Ind. 1981), *aff'd* 682 F.2d 626 (7th Cir. 1982), *cert. denied,* No. 82-512 (January 10, 1983)[18] establishes the standard for issuance of a warrant under Section 114(a) of the Act.

> The level of probable cause required to support an administrative inspection warrant has been the subject of considerable discussion in recent years. It is clear that the probable cause standard for such a warrant is somewhat less stringent than that required in criminal matters.

509 F. Supp. at 723. The Court went on to hold:

> Whether an agency inspection is pursuant to a pre-established administrative plan or the result of specific employee complaints is immaterial insofar as the level of probable cause required to support a warrant is concerned. *Burkart* [*Randall Div. of Textron, Inc.* v. *Marshall,* 625 F.2d 1313, 1316 (7th Cir. 1980] ... *In the Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.,* 589 F.2d 1335 (7th Cir. 1979), *cert. denied,* 444 U.S. 884 ... (1979).

509 F. Supp. at 723, quoting with approval *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307 (1978).

Applying this "flexible administrative probable cause standard", 509 F. Supp. at 723, to the facts of this case, it is clear that EPA met the legal and factual standards for issuance of the warrant.[19]

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[18] The district court opinion relied on herein regarding warrants was adopted in full by the Seventh Circuit. 682 F.2d at 638.

[19] Compare Appendix I to *Public Service Co. of Indiana, Inc., supra,* 509 F. Supp. at 723.

EPA has legal authority to inspect and copy records to ascertain compliance with the Act. As discussed in the Affidavit of Paulette Peltz at ¶ 5-11, Attachment A, EPA has authority under Section 113(a) of the Act to enforce, under certain conditions, requirements of state law which are part of a SIP approved by EPA under Section 110(a)(1). Five states (California, Idaho, Texas, Virginia, and Wisconsin) have provisions in their federally-approved SIP's which prohibit any person from removing or disabling motor vehicle emission controls or from causing such tampering. *Id.* EPA's authority to enforce these State provisions under Section 113(a) is sufficient to justify issuance of a search warrant under Section 114, provided there was reason to believe that CED's had "caused" tampering in any of those states.

Moreover, Section 203(a) is applicable to CED's. Contrary to CED's claims,[20] there is no limitation in the statute as to who may be liable for "causing" a violation of the anti-tampering prohibition of Section 203(a)(3)(B). Paragraph (a) of Section 203 unambiguously prohibits "the following acts [including tampering by automobile repair shops] and the causing thereof—..." without regard to the identity of the person causing the tampering. It is a well-established principle of construction that a statutory provision should be interpreted according to the plain, ordinary meaning of its words, *e.g., Perrin* v. *United States,* 444 U.S. 37, 42 (1979). Interpreting Section 203(a) to include any person who causes tampering is also consistent with the purpose of the Act "to protect and

[20] CED's apparently would read the restrictive language of Section 203(a)(3)(B) (limiting its scope to persons "repairing, servicing, selling, leasing . . . , trading, . . . or who operate fleets of motor vehicles. . . .") into Section 203(a) as well. There is no support for this reading and it would force an unnecessary and illogical redundancy into the section. Such a strained interpretation should not be accepted in place of a plain, common sense, literal interpretation. *Cf. Citizens to Save Spencer County* v. *EPA,* 600 F.2d 894,870 (D.C. Cir. 1979).

enhance the quality of the Nation's air resources," Section 101(b)(1), 42 U.S.C. 7401(b)(1), and with Congressional concern that tampering with emission controls will "cause [automobile] emissions [to] increase dramatically." S. Rep. No. 95-127, 95th Cong., 1st Sess. (1977) at 78, Leg. Hist. at 1452.

EPA also made the requisite factual showing to obtain the warrant. For example, EPA submitted evidence to the magistrate alleging that Ced Kotowicz (president of CED's, Inc.) had advised the owner of a repair shop that he was unaware of any limitations on the length of time a "test tube" could be left on a vehicle after its catalytic converter was removed by the repair shop. *See* Attachment A (Peltz affidavit) at ¶ 20; Attachment J (Kenny Affidavit). This statement, if true,[21] would allow a reasonable inference that CED's intended that the repair shop would use "test tubes" to permanently replace catalytic converters, or knew that "test tubes" would be used for that purpose.[22]

EPA also submitted evidence to the magistrate that CED's sells its "test tubes" in all states including those (Texas, Idaho, Wisconsin and Virginia)[23] which have federally enforceable SIP provisions prohibiting tampering. In sum, there was evidence that:

(1) Ced Kotowicz had discussed use of test tubes as permanent replacements for converters with a repair shop

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[21] Administrative probable cause can, of course, be based on hearsay contained in the government's supporting affidavits. *See, e.g., Burkart Randall Div. of Textron, Inc.* v. *Marshall, supra,* 625 F.2d at 1319.

[22] It would be irrelevant whether Mr. Kotowicz believed in good faith that there was no legal limit on how long a "test tube" could be left in place. It would be sufficient that he caused someone in the repair business to knowingly remove and replace a converter without regard to his knowledge of the law.

[23] CED's alleges it no longer sells "test tubes" in California, another State with a federal enforceable anti-tampering prohibition.

owner; (2) CED's actively promoted sales of test tubes to repair shops through advertisements in trade magazines and attendance at trade shows; (3) only a very small percentage of do-it-yourself car owners purchase exhaust parts from repair shops; (4) only a minority of car owners are capable of replacing their own catalytic converters; (5) certain repair shops have already replaced converters with CED's test tubes; (6) the packaging and advertisements for test tubes strongly promote replacement of catalytic converters, but contain no instructions for any legitimate testing use of test tubes or instructions for removing test tubes after testing; (7) test tubes are comparatively inefficient testing devices; (8) warnings of possible violations of the law to users of test tubes on packages and in advertisements are inconspicuous and vague; (9) over 30 states restrict or prohibit most uses of test tubes by any person; and (10) sales of catalytic converter replacement pipes may exceed one million per year, nationwide, of which the majority may be produced by CED's, including sales in States with essentially no legal uses, Attachment A at ¶ 24, 29, (Peltz Affidavit); "Market Facts Survey," Attachment H. *See* Attachments A-F, H-K, M-D.

This evidence, and the permissible inferences that can be drawn from it, easily meet the standard for administrative probable cause for issuance of the warrant.

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